

**Commonwealth of Kentucky
Workers' Compensation Board**

OPINION ENTERED: June 1, 2018

CLAIM NO. 199800640 & 199609253

AIG, AS MEDICAL PAYMENT OBLIGOR FOR
UNICORN MINING

PETITIONER

VS. **APPEAL FROM HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE**

CHARLES MARCUM,
DR. THOMAS KARELIS, AND
HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

ALVEY, Chairman. AIG, as the Medical Payment Obligor for Unicorn Mining ("AIG") appeals from the Opinion and Order rendered on November 1, 2017 by Hon. John H. McCracken, Administrative Law Judge ("ALJ"). The ALJ found compensable Charles Wayne Marcum's ("Marcum") treatment with liquid

Hydrocodone and Lyrica prescribed by Dr. Thomas Karelis. AIG appeals from the February 15, 2018 order denying its petition for reconsideration.

AIG argues the ALJ erred in finding compensable Marcum's treatment with liquid Hydrocodone and Lyrica prescribed by Dr. Karelis. It argues the need for liquid medication is unrelated to the work injury, and is therefore not compensable. It argues that based upon the report of Dr. Rafid Fadul who reviewed the claim on its behalf, the medication could be crushed and added to liquid or food.

Marcum filed a Form 101 on February 7, 1997, alleging he sustained a leg amputation above the right knee, and broken bones in his left foot when a shuttle car loaded with coal ran over his lower extremities. Hon. Lloyd R. Edens, Administrative Law Judge, awarded Marcum permanent total disability and medical benefits in an Opinion, Award and Order rendered August 18, 1998.

AIG filed a motion to reopen on March 18, 2011, to challenge monthly office visits with Dr. Werner Grentz, and monthly drug screens. On May 11, 2011, AIG filed an additional medical dispute challenging a proposed lumbar MRI. On March 4, 2012, Hon. Otto Daniel Wolff, IV, Administrative Law Judge, issued an Opinion and Order finding the MRI, and monthly office visits with Dr. Grentz and monthly drug

screens, not compensable. He found quarterly office visits with Dr. Grentz, and quarterly drug screens are compensable.

On April 22, 2016, AIG filed a medical dispute, and motion to reopen to challenge Marcum's treatment with Nucynta ER, Lyrica and Duexis. In a decision issued September 12, 2016, Hon. Jeanie Owen Miller, Administrative Law Judge, found the treatment with Duexis was not reasonable and necessary. However, she found treatment with Nucynta ER and Lyrica was compensable.

On February 16, 2017, AIG filed a motion to reopen to challenge Marcum's treatment with liquid Hydrocodone and Lyrica prescribed by Dr. Karelis. In support of the reopening, AIG filed Dr. Fadul's report. Dr. Fadul stated the need for liquid medication is unrelated to the work injury. He stated it is due to the fact Marcum has developed unrelated laryngeal cancer. He stated swallowing problems are common for such cancer. He stated Hydrocodone and Lyrica could be crushed and added to liquid or food.

Marcum filed a response/letter on March 3, 2017. He stated as follows:

After complications with swallowing, due to throat cancer, I was unable to obtain enough nutrition through eating. Because of this, I was forced to rely on a PEG feeding tube, which is inserted into my stomach. More than 90 percent of my food intake currently comes from the use of my

PEG feeding tube, and it became very difficult to swallow pills. At that time, my physician began prescribing me liquid form of my medications. My pain medication and nerve pain medication are vital in coping with the chronic pain I endure daily, which was a result of my work-related accident in 1996, in which my left leg was amputated, as well as muscles taken out of my back to salvage what was left of my leg. I am currently in the process of consulting with doctors to attempt to repair my esophagus via surgery and therapy to allow me to regain my ability to swallow and eat, but until there is improvement with this issue, it is very difficult for me to swallow more than water and other thin liquids.

The ALJ issued an Opinion and Order on November 1, 2017. The ALJ noted AIG contested Marcum's ongoing treatment with the medication, but only the form of its delivery. The ALJ specifically found as follows:

Defendant is not contesting the use of the medication taken by Mr. Marcum, but it is contesting the form of the medication (i.e. liquid vs pill). Although Dr. Fadul stated that the Hydrocodone and Lyrica pills could be crushed and added to either water or food, he did not state that Mr. Marcum would be able to take the medicine in that form, as opposed to the liquid form he was being prescribed. The ALJ understands that Mr. Marcum's laryngeal cancer is unrelated to his work injury; however, the Defendant is required to pay for medication that cures and/or provides relief from the effects of his work injury. KRS 342.020 does not prescribe the method of how treatment is to be rendered. In his statement filed of record, Mr. Marcum stated that 90% of his

food intake is from a PEG feeding tube inserted into his stomach. Swallowing pills is very difficult for Mr. Marcum. The PEG feeding tube is present due to complications in his ability to swallow. Mr. Marcum stated that it is very difficult for him to swallow more than water and thin liquids.

The ALJ finds that Defendant has not met its burden of proof in this post award medical dispute. The ALJ believes that Defendant must prove that Mr. Marcum is capable of swallowing pills in a crushed form. Because Mr. Marcum takes 90% of his food intake through a feeding tube, the ALJ is not convinced that he will be successful in doing that. However, in this post award medical dispute, the ALJ finds that it is Defendant's burden of proof to demonstrate Mr. Marcum's ability to take the pill in a crushed form and that has not been done to the satisfaction of the ALJ.

ORDER

Defendant/Employer's motion to re-open this case pursuant to the medical dispute filed of record to contest the recommended treatment from Dr. Thomas Karelis (liquid form of medication) is overruled and the relief sought is denied.

AIG filed a petition for reconsideration arguing the ALJ erred in finding it had not satisfied its burden to prove Marcum is capable of consuming the medication in crushed form. It argued Dr. Fadul's report constitutes substantial evidence supporting a determination Marcum is capable of consuming medication in a crushed form.

The ALJ denied the petition for reconsideration in an order entered February 15, 2018. He specifically found as follows:

Defendant filed a Petition for Reconsideration setting forth the proof that it believes supports its position as stated prior to the decision. The ALJ rendered his decision after considering the proof submitted by all parties. It appears as though the Petition for Reconsideration appears to be a reargument of the original case.

Therefore, the ALJ over-rules the Petition for Reconsideration.

Regarding the ALJ's determination of the compensability of the liquid forms of Hydrocodone and Lyrica prescribed by Dr. Karelis, we note that notwithstanding the holding in C & T Hazard v. Chantella Stollings, et al., 2012-SC-000834-WC, 2013 WL 5777066 (Ky. 2013), an unpublished decision from the Kentucky Supreme Court, a long line of reported decisions establishes in a post-award medical fee dispute, the employer bears both the burden of going forward and the burden of proving entitlement to the relief sought, except that the claimant bears the burden of proving work-relatedness. National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. 1991); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997); Mitee Enterprises vs. Yates, 865 S.W.2d 654

(Ky. 1993); Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993).

The compensability of the treatment with Hydrocodone and Lyrica is not at issue. AIG has not challenged Marcum's treatment with either medication, and therefore, the only determination is the delivery method. AIG bore the burden of proving the liquid form of the medication is neither reasonable nor necessary. The question on appeal is therefore whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller

v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

In this instance, the ALJ determined treatment with the liquid forms of the medication is reasonable and necessary. He explained the reasons for his determination, and specifically outlined Marcum's difficulty with swallowing. While Marcum may well retain some residual

ability to swallow, he specifically explained he has difficulty doing so for "more than water or thin liquids". The ALJ determined, based upon the information provided, Marcum has difficulty with swallowing.

The ALJ also acknowledged Marcum's laryngeal cancer is unrelated to his work injuries. Despite that condition, the ALJ noted that pursuant to KRS 342.020, AIG is required to pay for the cure and effects of the work-related injury. While the ALJ could have found the treatment with liquid medications contested by the ALJ as non-compensable, he explained the reasons for his determination to the contrary. The report of Dr. Fadul could have supported, but does not compel a contrary result.

AIG essentially requests this Board to re-weigh the evidence, and substitute its opinion for that of the ALJ, which we cannot do. Whittaker v. Rowland, supra. AIG merely points to conflicting evidence supporting a more favorable outcome, which is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., supra.

While authority generally establishes an ALJ must effectively set forth adequate findings of fact from the evidence in order to apprise the parties of the basis for his decision, he is not required to recount the record with line-by-line specificity nor engage in a detailed explanation of

the minutia of his reasoning in reaching a particular result. Shields v. Pittsburgh and Midway Coal Mining Co., supra; Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). The ALJ's analysis of the evidence in this claim was sufficient to support his determination. Likewise, we do not believe the ALJ abused his discretion or committed reversible error. The record supports the ALJ's decision, and therefore we affirm.

Accordingly, the Opinion and Order rendered by Hon. John H. McCracken, Administrative Law Judge, on November 1, 2017, and the order on reconsideration issued on February 15, 2018, are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON H BRETT STONECIPHER
300 EAST MAIN ST, STE 400
LEXINGTON, KY 40507

RESPONDENT, PRO SE:

CHARLES WAYNE MARCUM
51 OAKMONT RD
MANCHESTER, KY 40962

RESPONDENT:

DR THOMAS KARELIS
311 ROY CAMPBELL DR
HAZARD, KY 41701

ADMINISTRATIVE LAW JUDGE:

HON JOHN H MCCRACKEN
657 CHAMBERLIN AVE
FRANKFORT, KY 40601